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In the Supreme Court of the United States

OCTOBER TERM, 1996

AUTEK SYSTEMS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a contracting officer's receipt of a bribe in connection with the award of one contract precludes the government from terminating another contract for default, where the default is not the result of the bribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C13) is unpublished, but the decision is noted at 82 F.2d 434 (Table).[1] The opinion and order of the Court of Federal Claims (Pet. App. A1-A42) is unreported.

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[1] Petitioner's appendix contains the opinions, orders, and judgments below, but numbers them separately. We will refer to items in the petition appendix using alphabetical designations. Thus, "Pet. App. A" refers to the first item in the petition appendix. "Pet. App. B" refers to the second item in the petition appendix, and so forth.

JURISDICTION

The judgment of the court of appeals (Pet. App. D) was entered on March 22, 1996. The petition for rehearing was denied on April 30, 1996 (Pet. App. F). The petition for a writ of certiorari was filed on July 11, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, Autek Systems Corporation (Autek), challenges the termination for default of Autek's contract to manufacture electronic testheads (microprocessor-based devices designed to test electronic components) for the United States Marine Corps Automated Test Equipment System.

1. The contract, awarded in August 1986, required Autek to produce 95 testheads and related equipment, software, and technical data. Pet. App. C2, A1-A2. Under the terms of the initial contract, Autek was responsible for the hardware component of the contract, and Northrop Corporation (Northrop) was responsible for developing the software component as a subcontractor under Autek's contract; the Corps had rejected Autek's previous proposal to serve as prime contractor without Northrop's involvement. *Id.* at C2, A1-A2.

Problems arose in Spring 1987 between Autek and Northrop, and Autek subsequently failed to meet the initial delivery schedule for the testheads. Pet. App. C2, A3-A4. As disputes continued between Autek and Northrop, in early August 1987 the Marine Corps signed a direct letter contract with Northrop for the software; that letter contract was terminated in October 1987 because the parties could not agree on price. *Id.* at C2, A4-A5.

In March 1988, following several months of negotiations, Autek and the Marine Corps entered into Modification P00009, which removed the software and related items from Autek's contract. Pet. App. A6-A7. In April 1988, Jack Sherman, the Marine Corps supervisory contracting officer, caused an award of the software contract to Whittaker Command and Control Systems, Inc. (Whittaker). *Id.* at C2, A5.[2] Mr. Sherman was subsequently convicted of receiving a bribe to steer the software contract to Whittaker. *Id.* at C2, A3.

Despite the initial delays in delivering the testheads, Autek delivered and the Marine Corps accepted testheads 1-24. Pet. App. C2, A4-A7. The Corps determined, however, that the delivered testheads were technically deficient, and it rejected subsequent testheads for failure to meet the contract's specifications. *Id.* at C3, A4-A8. In September 1989, the Marine Corps issued a cure notice to Autek. *Id.* at C3, A10-A11. After discussions, the parties entered into Modification P00012 to the contract, which identified five technical issues for Autek to resolve. *Id.* at C3, A11-A12.

In November 1989, the Corps issued another cure notice for Autek's failure to make progress in resolving testhead deficiencies and to complete warranty repairs and corrections pursuant to the requirements of Modification P00012. Pet. App. C3, A14. Autek responded in December 1989, denying responsibility for the lack of progress. *Id.* at C3, A25-A26. In January 1990, the Marine Corps terminated the contract for

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[2] The government initiated new negotiations with Northrop in February 1988, at which time Mr. Sherman proposed to award Whittaker the software contract. Pet. App. A5.

default and asserted a claim against Autek for a refund of the amounts paid for the defective testheads. *Id.* at C3, A27-A28.

2. In July 1990, Autek sued in the Court of Federal Claims for rescission of the termination for default or, alternatively, conversion to termination for convenience. Pet. App. A28. Among other things, Autek argued that Modification P00009, which removed the software items from the contract, was void and unenforceable because it was tainted by Mr. Sherman's acts of bribery and, therefore, Autek was not responsible for failing to perform according to the contract's terms. *Id.* at A30-A31. Autek relied on *Godley* v. *United States*, 5 F.3d 1473, 1475 (Fed. Cir. 1993), which holds that "a Government contract tainted by fraud or wrong-doing is void *ab inito*." Pet. App. A31.

The Court of Federal Claims rejected Autek's claims and granted the government's counterclaim for a refund of the amounts paid for the faulty testheads. Pet. App. A31, A39-A42. Rejecting Autek's claim that Mr. Sherman's bribery voided the contract, the court reasoned that "[t]he *Godley* rule does not * * * apply to [Modification] P00009 because, as plaintiff concedes, the record discloses no causal link between the agent's fraud and this modification." *Id.* at A31. The court observed that Autek "presented no evidence that Mr. Sherman in any way instigated the problems between Autek and Northrop that led to [Modification] P00009, nor that he did more than capitalize on the existing situation when, the following year, he proposed awarding the software contract to Whittaker." *Ibid.* The court also concluded that "the rule at issue in *Godley* is not a contractor defense," but instead protects the public "from paying the costs associated with contracts tainted by govern-

ment officers' wrongdoing by allowing the *government* to rid itself of such contracts." *Id.* at C31-C32 (internal quotation marks and citation omitted).

3. The court of appeals affirmed the trial court's ruling that the government had permissibly terminated the contract for default. Pet. App. C1-C13.[3] The court of appeals held that the Court of Federal Claims correctly rejected Autek's attempt to void the contract because "there was no causal link between Mr. Sherman's fraud and the contract changes and, even if there were such a link, it did not make Autek's performance impossible or impractical." *Id.* at C4 (internal quotation marks omitted). The court of appeals also found that termination for default was appropriate because "it is clear that the technical issues were not being solved by Autek," as required by the contract. *Id.* at C5.

ARGUMENT

The unanimous decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this case is not warranted.

1. Autek argues (Pet. 20) that the government's default termination of its contract is inconsistent with the legal standard articulated in *United States* v. *Acme Process Equipment Co.*, 385 U.S. 138 (1966), and *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961). Autek asserts that those decisions require that "[o]nce the taint is established" in a government contract, "neither party

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[3] The court remanded to the trial court to reconsider the government's counterclaim pertaining to those testheads that had been accepted by the government. Pet. App. C6-C13.

should be permitted to enforce the contract against each other to its detriment." Pet. 24.

Autek misreads the Court's holdings in *Acme* and *Mississippi Valley*. Both cases held that the government may terminate a government contract that is obtained through bribery or fraud. The Court in *Acme* concluded that the "public policy [against bribery] requires that the United States be able to rid itself of a prime contract tainted by kickbacks." 385 U.S. at 146. See also *Mississippi Valley*, 364 U.S. at 566 ("the Government may disaffirm a contract which is infected by an illegal conflict of interest"); *id.* at 563 ("contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government"). Neither *Acme* nor *Mississippi Valley* supports the proposition that a taint of fraud in connection with one contract prevents the government from terminating a different, albeit related, contract for default when the fraud did not cause the defaulting contractor's non-performance.[4]

2. The court of appeals properly upheld the trial court's finding that there was no causal link between Mr. Sherman's receipt of a bribe and Modification P00009, which was a bilateral agreement between the government and Autek. Pet. App. C4, A31-A32. Similarly, the trial court properly concluded that there was no link between the bribe and Autek's failure

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[4] Petitioner observes (Pet. 24) that the Court in *Acme* and *Mississippi Valley* did not require the government to prove causation to terminate a contract tainted by fraud. In the present case, however, because the bribery associated with the Whittaker contract was not causally linked to Modification P00009 of Autek's contract, there is no proof that the Autek contract was tainted by fraud.

to perform under the contract. *Id.* at C4, A32. Autek argues (Pet. 26-29) that the trial court was incorrect in concluding that the causal link was missing and that such a link was required. Autek has failed, however, to demonstrate that either the factual findings or the legal conclusions reached by the decisions below contain any error warranting this Court's review. Because both lower courts are in agreement on the record and no obvious or exceptional showing of error is present, this Court should not undertake further review of those findings of fact. See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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